UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE BECHEN, RONALD BIENDSEIL, RON BOONE, VERA BOONE, ELVIRA BUMPUS, EVANJELINA CLEEREMAN, SHEILA COCHRAN, LESLIE W. DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH, CLARENCE JOHNSON, RICHARD KRESBACH, RICHARD LANGE, GLADYS MANZANET, ROCHELLE MOORE, AMY RISSEEUW, JUDY ROBSON, GLORIA ROGERS, JEANNE SANCHEZBELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE, and RONALD KIND,

Intervenor-Plaintiffs,

v.

Case No. 11-CV-562
JPS-DPW-RMD

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRIS, PAUL D. RYAN, JR., REID J. RIBBLE, and SEAN P. DUFFY,

Intervenor-Defendants.

VOCES DE LA FRONTERA, INC., RAMIOR VARA, OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Members of the Wisconsin Government Accountability Board, each only in his official capacity: MICHAEL BRENNAN, DAVID DEININGER, GERALD NICHOL, THOMAS CANE, THOMAS BARLAND, TIMOTHY VOCKE and KEVIN KENNEDY, Director and General Counsel for the Wisconsin Government Accountability Board,

Defendants.

INTERVENOR-PLAINTIFFS' TRIAL BRIEF

This proceeding involves, in part, the boundaries of the Wisconsin's Congressional Districts (hereinafter "CDs"). The original complaint was filed by Alvin Baldus, and others. Wisconsin's five Republican Congressional Representatives intervened as defendants. Wisconsin's three Democratic Congressional Representatives intervened as plaintiffs. (Joint Final Pretrial Report, Stipulated Facts, ¶ 108, 112) (hereinafter "Stip. Facts".)

The Complaint-in-Intervention alleged three claims against the Government Accountability Board ("GAB") arising out of Wisconsin Act 44 relating to congressional redistricting. These claims are:

FOURTH CLAIM

Congressional Districts Are Not Compact and Fail to Preserve Communities of Interest

[It includes these allegations:]

50. The federal and state constitutions require that political districts be compact and preserve communities of interest, including core populations that historically have been in the same district.

51. The compactness of a district refers both to its shape and the ability of its citizens to relate to each other and their elected representative and the ability of the representative to relate to his or her constituents.

* * *

53. A related principle is that communities be preserved. A "community of interest" refers to local government units and tribal boundary and also includes but is not limited to considerations of the citizen's ethnicities, cultural affinities and traditional geographical boundaries, historical political representations and the community's need for government services.

54. Fracturing communities of interests adversely affects the ability of citizens to relate to each other and their representatives.

EIGHTH CLAIM

New Congressional and Legislative Districts Are Not Justified By Any Legitimate State Interest.

89. The state failed to take into account the well-established principles of compactness, maintaining communities of interest, and preserving core populations from prior districts in establishing new district boundaries.

INTRODUCTION

Following the 2010 census Wisconsin had grown about 6%. (Stip. Facts, ¶ 92.) This meant that the ideal population for a CD should be 710,873 and the ideal population for CD's Three, Seven, and Eight should total 2,132,619. (Stip. Facts, ¶ 94.) It was, in fact, 2,126,078--.3% from the ideal population. The Third was 19,084 over ideal population; the Seventh was 21,594 below ideal population; and the eighth was 4,031 below ideal population. (Joint Final Pretrial Report, Exh. A, Table 29.)[1]

The redrawing of congressional boundaries for the Third, Seventh, and Eighth should have been a no-brainer. There was minimal population that needed to be shifted from one CD to another and the districts were contiguous. (Table 29.) Six of the eight members of the congressional delegation (Republican representatives Ryan, Sensenbrenner, and Petri, and

[1] The Defendants have stipulated to Table 29.

Democratic representatives Kind, Baldwin, and Moore) had all agreed to the previous boundaries adopted in 2001. All that was needed was to shift about 20,000 in population from the Third to the Seventh—a shift that could be easily accomplished. (Stip. Facts, ¶ 200(e).) Nothing needed to be done in the Eighth as a disparity of 4,000 from ideal population is not considered significant. (Stip. Facts, ¶200(b).)

However, instead of shifting 20,000 people, the bill that was enacted (Act 44) shifted a population of 799,841 in Districts Three, Seven, and Eight. (Table 29.)

Act 44 was designed by Andrew Speth, the Chief of Staff for Congressman Ryan. (Stip. Facts, ¶ 207.) Mr. Speth considered issues of zero deviation and what he understood to be the requests of members of Congress. (Stip. Facts, ¶¶ 212, 213, 227); (Joint Final Pretrial Report, Intervenor-Plaintiffs Statement of Contested Facts, ¶¶ 373, 375.) The Defendants and Intervenor –Defendants claim that all other factors are irrelevant and must be ignored. (Dkt. 75.) However, that is not the law. In *Gaffney v. Cummings*, 412 U.S. 735,748, 93 S.Ct. 2321,2329 (1973)(a case frequently cited by Defendants and Intervenor-Defendants) the Supreme Court stated :

> More fundamentally, *Reynolds* recognized that "the achieving of fair and effective representation for all citizens is…the basic aim of legislative apportionment,"

Equal population is important for fair representation. However, *effective representation,* requires more than zero deviation. (Joint Final Pretrial Report, Intervenor-Plaintiffs Proposed Conclusions of Law, ¶¶ 579.) It requires a consideration of the day-to-day operations of the legislative process.

> An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Id. 748. The Defendants and Intervenor-Defendants are asking the court to merely count noses and ignore the factors important to *effective representation*.

The Intervenor-Plaintiffs agree that zero deviation is an important redistricting consideration, but not the only one. *Effective representation* requires more than a mere nose count.

With modern computer programs the numbers of boundaries that can be drawn with zero deviation are limitless. (Joint Final Pretrial Report, Plaintiffs' Statement of Contested Facts, ¶ 266.) In this case the Third and Seventh Congressional Districts have shared a common boundary for decades. Following the 2010 census zero deviation for these two districts could be reached subtracting 19,084 from the Third District and adding 21,594 to the Seventh.

Clark County is on the border between the two Districts. In 2002 Clark County was split between the Third and the Seventh District. If all of Clark County is placed in the Seventh District and nothing else was done to the District boundaries zero population deviation could probably have been achieved. (Speth Dep, p. 141 line 10 to p. 142 line 24.)

Since zero deviation can be achieved either by Act 44 or by making minimal changes between the boundaries of the Third and the Seventh the concept of zero deviation is not a relevant factor in choosing one redistricting plan over the other. The congressional boundaries for the Third, Seventh, and Eighth districts had been approved without court challenge by the legislature and the Governor in 2002. There had been little change in these boundaries for decades. These boundaries have stood the test of time as providing effective representation. They should have only been changed to account for the minimal population changes since 2000.

Computers are a wonderful invention and are helpful in determining zero deviation. But, when it comes to day-to-day representation a computer is far inferior to a congressman, like

Congressman David R. Obey, who represented the Seventh Congressional District for 41 years — about 15,000 days. The phrases representative democracy, core retention, compactness, and communities of interest are frequently used as redistricting principles. Congressman Obey will give these concepts meaning in the day-to-day representation of people in the district. Effective representation requires considerations of these principles. (Obey Trial Testimony; Trial Exh. 19.)

I. Representative Democracy Has Been Damaged By Act 44.

In 1992 a Three-Judge Panel determined a dispute relating to failed attempts to redistrict the Wisconsin Legislature. *Prosser v. Elections Bd.*, 793 F. Supp. 859. At that time there was no plan that had been adopted. Nonetheless, the court said that if a plan had been adopted its job would be to determine whether the plan struck a reasonable balance among redistricting considerations. *Id.* at 864. The principal considerations discussed were community of interest and compactness with the ultimate goal being a plan that is best for representative democracy. *Id* at 863-864.

Traditional redistricting considerations are based upon those factors that relate to effective representation. Representative democracy requires, among other things, a well-informed electorate; an electorate that can use the political process to focus upon important issues; and an electorate that has good access to government.

Based upon these considerations Act 44 is a miserable failure in CD Three, Seven and Eight. Representative democracy will be badly damaged in these districts if the boundaries drawn in those three districts are permitted to stand.

II. Act 44 Ignores The Redistricting Consideration of Core Retention.

One of the redistricting principles is "core retention". *See Abrams v. Johnson*, 521 U.S. 74, 99-100 (1997); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1349 (N.D. Ga. 2004). This means retaining the core of the previous district. [2]

Core retention deals with a person's continued relationship to the same district. It is based on the understanding that the more familiar voters are to their district and their representatives the more informed they will be about the issues in the district and the better access they will have to government.

Act 44 ignored these considerations when the boundaries of the Third, Seventh, and Eighth Districts were redrawn. The 2002 redistricting plan was recommended by a bipartisan congressional delegation. It was passed by the Wisconsin legislature and signed into law by the Governor. It was not challenged in court. There would be no reason to change those districts unless there had been large population shifts, the state had lost a congressional seat, or there had been changes in the ethnic composition of a district requiring changes because of the Voting Rights Act.

None of these considerations are relevant for the Third, Seventh, or Eighth Congressional Districts. Nor did the plan conform to the principle of Core Retention

Table 29, to which the Defendants have stipulated and which is reproduced in relevant part below was prepared by Professor Erik V. Nordheim. It depicts the extreme movements of population caused by Act 44. For example in District Seven a total of 322,384 people are either

[2] The defendants in this action named three individuals in their amended Rule 26 Disclosures "who were involved in reviewing population and other data so as to preserve, to the extent possible and practicable, the core population of prior districts as well as communities of interest." However, none of these individuals claimed any knowledge concerning how these factors were used in determining congressional boundaries.

shifted into or out of District Seven so that the end population will be increased by 21,594. This same result could have been largely achieved by leaving the Seventh District alone except to place all of Clark County in District Seven, rather than splitting it between District Three and District Seven as was done in the 2001 redistricting.

All that must be done in these three districts was to change the voting district of approximately 20,000 people in Clark County from the Third District to the Seventh District. This would likewise prevent the movement of 360,624 people in connection with the Third District and achieve core retention.

Table 29 … shows a tabulation of the total population shifted "in to" and "out of" each district.

District	shifted in to	shifted out of	net shift (in)
…			
3	171,270	190,354	-19,084
…			
7	171,989	150,395	21,594
8	59,752	55,721	4,031

(Table 29.)

No legitimate reason, incorporating recognized redistricting standards and principles, can be given for requiring this massive shift of population to achieve a minimal net change. In fact none exists.

The Third District adjoins the Seventh District primarily on the eastern border of the Third. (Trial Exh. 1014.) The 20,000 that would be shifted out of the Third District and placed into the Seventh District would mean that 97% of the population of the Third District would be retained under Act 44. However, Act 44 totally ignored the principle of core retention and moved 190,354 people into the District and moved out 171,270. (Table 29.)

The movement of these 361,624 people required a massive redrawing of the boundaries. St. Croix County, which borders the Mississippi River in the northwestern part of the State, was taken out of the Third and placed in the Seventh. Portage County, through which the Wisconsin River flows in Central Wisconsin, was taken from the Seventh and placed in the Third. Wood County, through which the Wisconsin River flows in Central Wisconsin, was formerly in the Seventh and now is split between the Seventh and the Third. Juneau County was formerly in the Third and is now split between the Seventh and the Third. Monroe County was formerly in the Third and is now split between the Seventh and the Third. Jackson County was formerly in the Third and is now split between the Seventh and the Third. Chippewa County was formerly in the Seventh and is now split between the Seventh and the Third. (Stip. Facts ¶ 192.)

All that was needed was to place all of Clark County in the Seventh District as Act 44 did anyway. The redrawing of the boundaries for the Third is totally irrational.

District Eight lies to the east of District Seven. District Eight was only 4,031 people below ideal population if the 2001 plan was used. This is only .57% below ideal population. According to *Prosser*, a deviation of one percent from ideal population is trivial. 793 F. Supp. 859, 866. This deviation is within only a few hundred people from meeting that threshold and is likewise trivial. If the boundaries of the Eighth are unchanged it would retain 100% of the core population. (Stip. Facts ¶ 200(c).) Instead, Act 44 inexplicably moved 55,721 out of District Eight and moved in 59,752. (Stip. Facts ¶ 200(f).)

The remaining five Districts are contiguous. (Trial Exh. 1014.) Under Act 44 these districts form a rather compact block in the southeastern portion of Wisconsin. (Trial Exh. 1015.) The largest deviations from ideal population are modest. The Second District (containing Madison) has grown in population and should be reduced 5.6% to reach ideal population. The

Fourth District (containing Milwaukee) has lost population and should be increased by 5.9% to reach ideal population. The remaining three districts need lesser population changes to reach ideal population. This means that 2001 boundaries of these five districts could be changed without impacting the Third, Seventh, and Eighth Districts.

III. Act 44 Violates The Redistricting Principle of Compactness.

Another key redistricting principle is compactness. *Prosser*, 793 F. Supp. at 863. This is considered desirable to reduce the travel time in campaigning and for the representative to travel throughout the district. *Id.* The redistricting plan reduces the compactness of the Third, Seventh and Eighth districts as compared to the prior plan. The reduction in compactness is statistically demonstrated by Professor Nordheim. (Stip. Facts ¶¶ 202-204.)

District Seven is particularly egregious. The district begins in the far northern part of the state at Lake Superior. Its southern terminus formerly was at the southern boundary of Portage and Wood County. These counties contain the significant population centers of Stevens Point (Portage County), Wisconsin Rapids (Wood County), and Marshfield (Wood County). The new boundary snakes around Portage County to exclude Stevens Point and bisects Wood County to exclude Wisconsin Rapids and then travels south to the southern tip of Adams County. (Trial Exh. 179, 1014, 1015.)

District Three is expanded eastward to envelope Portage and portions of Wood County. District Eight is expanded in the northwest to include Vilas County and expands in the South to include Calumet County. (Trial Exh. 179, 1014, 1015.)

A reduction in compactness can be justified to avoid dilution of ethnic minorities. However, that is not an issue in Districts Three, Seven and Eight. Compactness can also be reduced because of large population shifts. Again, this was not a factor. Finally, compactness

can be reduced to accommodate communities of interest. But that was not a factor here, and Act 44 did the exact opposite by splitting a key community of interest in Central Wisconsin.

Although the issue of compactness can be demonstrated by statistical methods, such an exercise ignores the real significance of why compactness is necessary for the best interests of representative democracy.

IV. Act 44 Ignores Communities of Interest.

Various courts, including the three-judge panel in the *Prosser* redistricting case found the concept of community of interest important. 793 F. Supp. at 863, 866.

The concept of a community of interest recognizes that groups of voters share similar concerns and values, and that such values must be represented in and addressed by their legislature. *See* Stephen J. Malone, "Note: Recognizing Communities of Interest in a Legislative Apportionment Plan," 83 Va. Law Rev. 461, 465-466 (1997). This notion, that a "diversity of interests" should be reflected in the legislature, dates back to the Founders and the American Revolution. John Adams wrote that a representative legislature, "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." *Id.* at 465 n 26.

Community of interest has been enshrined in the constitutions of several states. Alaska Const. art. VI, § 6 (new districts shall contain "as nearly as practicable a relatively integrated socio-economic area"); Colo. Const. art. V, § 47; Haw. Const. art. IV, § 6; Okla. Const. art. 5, § 9A. In employing Colorado's definition, the district court for the district of Colorado stated that communities of interest represent:

> Distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade. We are convinced that a plan which provides fair and

> effective representation for the people of Colorado must identify and respect the most important communities of interest within the state.

Carstens v. Lamm, 543 F. Supp. 68, 91 (D. Colo. 1982). That same court applied their definition to craft six Congressional districts: an urban district, a trade/industry district, a growth district, a mountain district, an agricultural district and a Colorado Springs area district. *Id.* at 96-97.

Similarly, in *Legislature of the State of California v. Reinecke* the Supreme Court of California approved of a Special Masters apportionment plan, who noted:

> The social and economic interests common to the population of an area which are probable subjects of legislative action...should be considered in determining whether the area should be included within or excluded from a proposed district in order that all of the citizens of the district might be represented reasonably, fairly, and effectively. Examples of such interests, among others, are those common to an urban area, a rural area, an industrial area or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process.

The Special Masters in that case recognized communities of interest based around the aviation industry and agriculture, as well as transportation corridors. 516 P.2d 6, 24, 26-27, 30, 31 (Cal. 1973). The Masters also tried to maintain the contiguity of frequent traffic patterns. *Id.* at 26-27. In *Mellow v. Mitchell*, the Pennsylvania Supreme Court also recognized communities of interest in adopting a new apportionment plan, relying on transportation patterns and social affiliations. 607 A.2d 204, 220-221 (Pa. 1992), cert. denied 506 U.S. 828 (1992). Federal district courts in Indiana and Arizona have also considered community of interest in reviewing redistricting plans. *Bandemer v. Davis*, 603 F. Supp. 1479 (S.D. Ind. 1984), rev'd 478 U.S. 109 (1986); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688 (D. Ariz. 1992), appeal dismissed sub nom. *Arizona State Senate v. Arizonans for Fair Representation*, 507 U.S. 980, and aff'd sub nom. *Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

Finally, community of interest is not a foreign concept to Wisconsin jurisprudence. This court relied heavily on the concept to draw an apportionment plan with the "objective of preserving identifiable communities of interest." *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 636 (E.D. Wis. 1982). This court considered communities based on race and income, as well as trying to keep suburbs intact in crafting boundary districts. *Id.* at 636-638.

Congressman Obey will testify that since at least the 1930's Marathon, Portage, and Wood Counties have been thought of as a single unit. Geographically the three counties are contiguous with regular borders. The major cities are Wausau, Stevens Point, Wisconsin Rapids, and Marshfield. Stevens Point is about a half an hours drive from all three. The Wisconsin River flows through Wausau, Stevens Point, and Wisconsin Rapids, and has played a major role in the economic activity of all three. Former Governor Lee Sherman Dreyfus, (a Stevens Point resident) referred to the three county area as the "Ruralplex" because of its economic and cultural integration. (Obey Trial Testimony.) Central Wisconsin's status as a community of interest is also supported by economic analysis provided by Professor Randy Cray. (Stip. Facts, ¶¶ 194(a)-(f).)

Act 44 ignores communities of interests. Despite the long history of recognition of these counties as a single unit, Act 44 splits off Portage County, which contains Stevens Point, and divides Wood County so that Wisconsin Rapids is in the Third District and Marshfield is in the Seventh District. (Stip. Facts, ¶ 192.)

Communities of interest determine the issues that are significant in an area. However, communities of interest do not mean that all residents believe the issues should be resolved the same. For example, the Wisconsin River creates a huge community of interest in the area. (Obey Trial Testimony.) The use of the river causes economic and recreational activity. (Stip.

Facts, ¶¶ 194(a)-(f).) These activities create a number of concerns such as water quality, air quality, water flow. The residents of the area will sometimes have differing opinions regarding these issues. Splitting the communities of interest will dilute the focus and the healthy debate that the people will have on these issues.

Another principle of redistricting is to avoid dividing political units. Under the 2001 alignment the Seventh District divides three counties (Clark, Oneida, and Langlade). If all of Clark is moved to the Seventh District only two counties would be divided.

The proposed redistricting has five partial counties in the Seventh District. (Chippewa, Jackson, Monroe, Juneau, and Richland). Jackson County is further fractured since there are three townships in the north that are in the Seventh District and another three townships on the east that are also in the Seventh District. However, the three townships in the north of Jackson County and the three townships in the east of Jackson County are not contiguous. (Stip. Facts, ¶¶ 192-193.)

The Third District only divided Clark and Sauk Counties in 2001. It now divides Wood, Chippewa, Jackson, Monroe, Juneau, and Richland Counties. (Stip. Facts, ¶ 192.)

The Eighth district currently has four divided counties: Oneida, Langlade, Outagamie, and Calumet. The proposed alignment has one, Outagamie. However, the Eighth only needed to add 4,031 in population. The proposal does this by changing the voting district of a population of 115,473 people, by adding portion of two new counties (Winnebago and Calumet) and subtracting 3 counties (Vilas, Florence, and Forest) and portions of four others (Oneida, Langlade, Winnebago, and Calumet). (Stip. Facts, ¶ 192.)

V. Act 44 Represents Unconstitutional Gerrymandering

In addition to the above, the Baldus Plaintiffs have put forth a claim and standard for an unconstitutional gerrymandering claim.

A *prima facie* case is established by showing that the redistricting legislation moved significantly more people than necessary to achieve the ideal population, and no traditional redistricting criteria can justify the movement. Defendants can rebut the *prima facie* case by showing that the movement was necessitated by justified changes in other district boundaries or by traditional redistricting criteria. Plaintiffs can sustain their burden of proof by establishing that defendants' explanations are pretextual or unfounded.

Act 44 moves significantly more people than necessary to achieve the ideal population, and no traditional redistricting criteria can justify the movement. The movement of significantly more people than necessary to achieve population equality, not necessitated by justified changes in other district boundaries or by traditional redistricting criteria, constitutes a violation of the Equal Protection Clause.

CONCLUSION

For the reasons stated above and in their various pleadings and briefs, the Intervenor-Plaintiffs Tammy Baldwin, Ronald Kind and Gwendolynne Moore respectfully request that this Court enjoin the use of the Congressional Map enacted by Wisconsin Act 44 in any future election or primary.

Dated this 17th day of January, 2012.

LAWTON & CATES, S.C.

/s/ P. Scott Hassett

P. Scott Hassett, SBN 1013921
Daniel S. Lenz, SBN 1082058
James A. Olson, SBN
10 E. Doty St., Suite 400
P. O. Box 2965
Madison, WI 53701-2965
(608) 282-6200
(608) 282-6252 facsimile

Attorneys for Intervenor-Plaintiffs,
Tammy Baldwin, Ronald Kind and
Gwendolynne Moore